FOR ARGUMENT

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NO. 88-7351

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JEFFREY ALAN WALTON,
Petitioner

v.

ARIZONA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA AND OTHER AMICI LISTED ON THE INSIDE COVER* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Most of the amici curiae are states which have death penalty statutes enacted in response to this Court's decisions in Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976).[2] The Court in Furman sought to limit the overbroad discretionary power of the capital sentencer to impose the death penalty. Pursuant to these decisions, amici enacted statutes which narrowed the class of death-penalty eligible offenders and which provided that the sentencers should consider mitigating evidence

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[2]Although the legislature in amicus curiae Kansas has not, as yet, enacted a death penalty statute, Kansas recognizes the importance of this issue and joins this brief.

as part of their individualized consideration of the defendants' crime and circumstances. After Furman, the statutory list of mitigating factors came into prominence and the Court in Gregg and Proffitt upheld the validity of guided jury discretion statutes patterned after the Model Penal Code.[3] The Model Penal Code is silent as to the burden of producing evidence of mitigation and the burden of proof on the issue.

Since Furman, many states, including amicus Pennsylvania and respondent

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[3]"[O]f the thirty-seven states which presently provide for capital punishment, only Texas and Oregon depart substantially from the Model Penal Code capital-sentencing format." Sicola, Shreves, Jury Consideration of Mitigating Evidence: A Renewed Challenge to the Constitutionality of the Texas Death Penalty Statute, 15:55 Am.J.Crim. Law 65 (1988).

Arizona, have placed minimal burdens of proof on defendants to prove mitigation in capital sentencing hearings.[4] If the Court reverses State v. Walton, 769

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[4]Various states by statute or case law explicitly place upon a defendant a burden to prove evidence in mitigation by a preponderance of the evidence. E.g., Arizona, Ariz. Rev. Stat. § 13-703(c)(defendant has burden of producing mitigating evidence) State v. Leslie, 147 Ariz. 38, 49, 708 P.2d 719, 730 (1985); State v. Harding, 137 Ariz. 278, 292, 670 P.2d 383, 397 (1983), cert. denied, 465 U.S. 1013 (1984); State v. Greenawalt, 128 Ariz. 150, 173, 624 P.2d 828, 851, cert. denied, 454 U.S. 882 (1981), State v. Rossi, 741 P.2d 1223 (Ariz. 1987)(defendant must prove by a preponderance of affirmative evidence the existence of what he asserts); Connecticut, State v. Daniels, 207 Conn. 374, 542 A.2d 306 (1988), Conn. Gen. Stat. § 53a-46(a) (West 1977); Florida, Fla. Std. Jury Instr. (Crim) § F.S. 921.141(6) (1985) (defendant establishes a mitigating circumstance if the jurors are "reasonably convinced [it] exists"); Kentucky, Ky. Rev. Stat. Ann § 523.025(b) (Michie/Bobbs - Merrill 1986), Smith v. Commonwealth, 599 S.W.2d 900, 911 (Ky. 1980); Maryland, Art. 27 § 413(g)(Supp. 1987), Foster v. State, 304 Md. 439, 476, 499 A.2d 1236, 1255 (footnote continued on next page)

P.2d 1017 (Ariz. 1989) and declares invalid Arizona's resolution of this

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[4](continued) (1985), reconsideration denied, 305 Md. 306, 503 A.2d 1326, cert. denied, 478 U.S. 1010 (1986) (risk of nonproduction and nonpersuasion is on the defendant); North Carolina, State v. McKoy, 323 N.C. 1, 372 S.E. 2d 12 (1988), cert. granted sub nom. McKoy v. North Carolina, ___ U.S. ___, 109 S.Ct. 1117 (1989), State v. Johnson, 298 N.C. 47, 75 n. 28, 257 S.E.2d 597, 618 n. 28 (1979); Ohio, Ohio Rev. Code Ann. § 2929.03(D)(1)(Anderson 1987) and State v. Jenkins, 15 Ohio State 3d 164, 171-172, 473 N.E.2d 264 (1984), compare State v. Lawrence, 44 Ohio State 3d 24, 541 N.E.2d 451, 455 (1989). Pennsylvania, 42 Pa. Cons. Stat. Ann. § 9711(c)(1) (iii) (Purdon 1982) ("mitigating circumstances must be proved by the defendant by a preponderance of the evidence"); Wyoming, Wyo. Stat. § 6-2-102(d)(i)(B) (Supp. 1989) (jury determines "[w]hether, by a preponderance of the evidence, mitigating circumstances exist...".)

Other states require the defendant to produce evidence of mitigation or to otherwise inject the issue into the proceedings, but do not place a burden of persuasion on the defendant. See e.g., Ala. Code § 13A-5-45(g) (state must disprove mitigating circumstance by preponderance; defendant has the burden of "interjecting the issue"); Ill. Stat. (footnote continued on next page)

issue, existing death sentences in these states and federal death sentences

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[4](continued) Ann. ch 38, 9-1 g (Smith-Hurd 1987) and, People v. Holman, No. 63771, slip. op. (Ill. Supreme Court, October 25, 1989), ___ Ill.2d ____, ___ N.E.2d ____, 1989 Ill. Lex. 135 (1989) (defendant must produce evidence but there is no required burden of proof on either party); Cf. Gaines v. Thieret, 665 F.Supp. 1342 (1987), rev'd on other grounds, 846 F.2d 402 (7th Cir. 1988) (no burden of production, state has burden of persuasion); N.J. Stat. Ann. § 2C:11-3(c) (2) (West Supp. 1987) (defendant has burden of producing evidence, no burden of proof on either party).

A number of states continue to have language which, like the Model Penal Code, does not define who has the burden of proof as to mitigation; moreover, the state decisional law also does not establish a burden of proof. See e.g. Cal. Penal Code § 190.3 (West Supp. 1988) and People v. Johnson, 47 Cal.3d 1194, 255 Cal. Rptr. 569, 767 P.2d 1047 (1989) (confirming that there is no established burden of proof); Colo. Rev. Stat. § 16-11-103(1)(d) (1987) ("There shall be no burden of proof as to proving or disproving mitigating factors."); La. Rev. Stat. Ann. § 905.5 (West Supp. 1988) and State v. Sonnier, 402 So.2d 650 (La. 1981) ("capital sentencing procedure does not establish any presumptions or burdens of proof with (footnote continued on next page)

could be invalidated. See 21 U.S.C.A. § 848 (j) (West Supp. 1989). Moreover, this Court's intervention in criminal procedures currently governed by state law could cause widespread attacks on all nature of burden of proof has tradi-

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[4](continued) respect to mitigating circumstances." Id. at 657); Mo. Ann. Stat. §§ 565.030, 565.032 (1986); Mont. Code Ann. Section 46-18-305 (1987); N.H. Rev. Stat. Ann. § 630.5 (1987); N.M. Stat. Ann. 31-20A-2 (1978) (statute and case law are silent on burden of production and persuasion); Okla. Stat. Ann. title 21, §§ 701.10, 701.11 (West Supp. 1987); Or. Rev. Stat. § 165-150 (1989); and S.D. Codified Laws Ann. § 23A-27A-3 (Michie 1988).

A fourth approach places the burden of proof on the state. See e.g. Wash. Rev. Code § 10.95.060(4) and State v. Mak, 105 Wash. 2d 692, 718 P.2d 407, 444 (1986), (construing statutory requirement that jury be "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstanes to merit criminal statutes where the leniency" to place the burden of proof on the state).

tionally been placed on defendants to show circumstances of justification, excuse, or alleviation.

SUMMARY OF ARGUMENT

1. Arizona's imposition of a minimal burden of proof of mitigation on the defendant in the sentencing phase of a capital case is consistent with this Court's decisions allowing states to require that defendants carry the burden of proof with regard to affirmative defenses presented during the guilt phase of a criminal trial. This Court, in an unbroken line of authority, has consistently upheld state decisions on the burden of proving affirmative defenses. See Leland v. Oregon, 343 U.S. 790-799 (1952); Patterson v. New York, 432 U.S. 197 (1977); and Martin v. Ohio, 480 U.S. 228 (1987).

Arizona's assignment of the burden of proof of mitigation comports with traditional treatment on the issue; is consistent with our notions of fundamental justice as set forth in these

cases; and is thus, consistent with this Court's jurisprudence on the issue at the guilt phase.

2. Even greater latitude is given to states under this Court's Due Process Clause analysis when the issue arises during the sentencing phase. While this Court has recognized that due process is applicable to the sentencing process, Gardner v. Florida, 430 U.S. 349 (1977), the process due at sentencing is not the full panoply of constitutional safeguards required at trial. Ibid. at 358 n. 9.

The issue of mitigation only comes into play at sentencing, after the state has proven beyond a reasonable doubt each element of the capital crime. At this point, traditionally, "sentencing courts have always operated without constitutionally imposed burdens of proof." McMillan v. Pennsylvania, 477

U.S. 79, 92 n. 8 (1986). Amici submit that filling that void, either statutorily or by state court decisional law, in the manner at issue comports fully with a defendant's right to due process.

3. Placing some minimal burden of proof of mitigation on the defendant does not hinder sentencer consideration of relevant mitigating circumstances.

The special requirements of due process and the Eighth Amendment in the context of a capital sentencing procedure are furthered, not hindered, by the procedure chosen by respondent. Placing the burden of proving mitigation on the defendant by a preponderance of the evidence permits individualized sentencing based upon reliable fact-finding. Arizona's mechanism for channeling sentencer discretion is neither mandated

by nor prohibited by Lockett v. Ohio, 438 U.S. 586, (1978) and Eddings v. Oklahoma, 455 U.S. 586 (1978).

As this Court has made clear several times, "we are unwilling to say that there is any one right way for a State to set up its capital punishment scheme." Spaziano v. Florida, 468 U.S. 447, 464 (1984); Cabana v. Bullock, 474 U.S. 376 (1986); Baldwin v. Alabama, 472 U.S. 372 (1985); Pulley v. Harris, 465 U.S. 37, 45, (1984).

The decision in Lockett left unanswered the issue of the propriety of the state's placing a burden of proof as to mitigating factors on the defendant. The amici submit that Arizona's resolution of this issue is one of the right ways a state may set up its capital punishment scheme.

ARGUMENT

A STATE MAY CONSTITUTIONALLY CHANNEL JURY DISCRETION IN CAPITAL SENTENCING BY REQUIRING THE DEFENDANT TO BEAR THE BURDEN OF PROVING A FACTOR IN MITIGATION BY A PREPONDERANCE OF THE EVIDENCE

A. Burdens of Proof May Be Placed On Defendant To Prove The Existence Of Mitigating Factors At The Guilt Stage

Historically, defendants have borne the burden of proving mitigation. Indeed, at common law, proof of "all... circumstances of justification, excuse, or alleviation" rested on the defendant. IV W. Blackstone's Commentaries 201 (Lippincott 1877). "This was the American rule when the Fifth Amendment [and the Eighth Amendment were]... ratified. Commonwealth v. York, 50 Mass. 93 (1845)." Patterson v. New York, 432 U.S. 197, 202 (1977) (footnote omitted). See also Fletcher, Two Kinds

of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, 882-884 (1968) and Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299, 1304 n. 21 (1977).

Upholding the validity of a statute which placed the burden of proving (beyond a reasonable doubt) an insanity defense on the defendant in a capital case, this Court stated: "We are reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice." Leland v. Oregon, 343 U.S. 790, 799 (1952). Stating that the rule in Leland remained good law in the aftermath of In re Winship, 397 U.S. 358 (1970) and

Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court went on to establish a framework for resolution of the burden of proof issue which when applied to this case compels affirmance. See Patterson v. New York, 432 U.S. 197 (1977) (upholding New York law requiring that defendant in a prosecution for second degree murder prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter.)

According to Patterson, to afford due process, the State need not disprove or prove beyond a reasonable doubt "every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the sentence." Id. at 207. Winship and Mullaney mandate the burden of proof for

elements of the crime, not for defenses.

Noting that:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. . . . [I]t is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. at 201-202, quoting Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland, supra at 798, and Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), the Court concluded that the State could put the burden of proof on defendant:

> If the State nevertheless chooses to recognize a factor

> that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the state to prove its nonexistence in each case in which the fact is put in issue, if in its judgment, this would be too cumbersome, too expensive, and to inaccurate.

432 U.S. at 209 (emphasis added) . Accord Martin v. Ohio, 480 U.S. 228 (1987) (upholding Ohio statute which placed on defendant the burden of proof by a preponderance of evidence for the affirmative defense of self-defense.)

Arizona's assignment of the burden of proof of mitigation comports with traditional treatment on the issue; is consistent with our notions of fundamental justice; and is thus, consistent with this Court's jurisprudence on the issue at the guilt phase.

B. Even Greater Latitude Is Given To States Under This Court's Due Process Clause Analysis Of Burden Of Proof Issues At Sentencing

While this Court has recognized that due process is applicable to the sentencing process, Gardner v. Florida, 430 U.S. 349 (1977), it has often concluded that the process required at the sentencing stage is not mandated by the process required at trial. Ibid. at 358 n 9.

"Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. See Williams v. New York, 337 U.S. 241 (1949)." McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986). Moreover, this Court has "never attempted to define precisely the constitutional limits. . . to which due process forbids the reallocation or reduction of burdens

of proof in criminal cases. . ." Id. at 86.

Sentencing under federal guidelines must be based upon "information [that] has sufficient indicia of reliability to support its probable accuracy." Guideline § 6A.13(a). The Sentencing Guidelines do not specifically address the subject of standards of proof or which party should bear the burden. Federal courts, however, "have generally agreed that a preponderance standard is the proper measure." United States v. Urrego-Linares, 879 F.2d 1234, 1238 (4th Cir. 1989) cert. denied, sub nom. Urrego-Linares v. United States, ___ U.S. ____, 110 S.Ct. 346 (1989) (citations omitted). In Urrego Linares, the Court held that:

> [I]f the government seeks to enhance the sentencing range and potentially increase the ultimate sentence, it should

bear the burden of proof.

* * *

> [However] if the defendant advances a mitigating factor which, if accepted by the court, would lower the sentencing range and potentially reduce the ultimate sentence, the defendant should bear the burden of proof to establish the mitigating factor(s) by a preponderance.

Id. at 1239 (citation omitted).

This is precisely the manner chosen by respondent and a number of amici to channel sentencer discretion. See n. 4, supra. Significantly, the United States Congress codifies the burden of proof in capital sentencing in the same manner. 21 U.S.C.A. § 848(j) (West Supp 1989). ("The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on

the defendant, and is not satisfied unless established by a preponderance of the evidence.")

The procedure challenged by Walton has widespread acceptance as expressed by state and federal statutory and decisional law.

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth consideration in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Leland v. Oregon, 343 U.S. 790, 798 (1952).

The "process due" at sentencing has never been held to require that the State bear the burden of proof on each and every factual question, the resolu-

tion of which may lead the sentencer to imposition of a penalty required by the legislature. McMillan, supra. There is nothing about a capital sentencing hearing that should cause this Court to construe Lockett or Mills, infra, as mandating an exception to the generally accepted principle espoused in Patterson, Martin, and Leland concerning the state's prerogative to assign a burden of proof to a defendant.

C. A State May Channel Jury Discretion By Requiring That The Defendant Prove Mitigating Factors And Still Comply With Eighth Amendment Individualized Sentencing

Amici recognize the special requirements imposed upon states to assure constitutional application of the death penalty by allowing a moral reasoned response informed by relevant evidence of mitigating circumstances. In this Court's decisions, the Court has recognized the propriety of allowing a defendant to bring forward the evidence in mitigation. See, e.g., Jurek v. Texas, 428 U.S. 262, 276 (1976) (authorizing the defense to bring before the jury whatever mitigating circumstances can be adduced); Lockett v. Ohio, 437 U.S. 586, 604 (1978) (sentencing authority may not be precluded from considering any aspect of record or character of defendant that

the defendant proffers as a basis for lesser sentence); Eddings v. Oklahoma, 455 U.S. 104 (1982) (Eighth Amendment requires that capital sentencing schemes permit the defendant to present any relevant mitigating evidence); Skipper v. South Carolina, 476 U.S. 1 (1986) (remanded for new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence).

Individual justices of the Court have stated, either explicitly or implicitly, that evidentiary burdens to prove mitigation may be placed on the defendant. "There can be no infirmity in shifting the burden of persuasion to the defendant." Lockett v. Ohio, 438 U.S. 586, 633 (Rehnquist, J., concurring in part and dissenting in part); "'Evidence in mitigation' must rise to a certain level of persuasiveness before

it can be said to constitute a 'mitigating circumstance.'" Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (Burger, C.J., dissenting).

Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988) is not to the contrary. The burden of proof issue was not presented to or decided by this Court in Mills. Mills addressed sentencing instructions which precluded jury consideration of mitigating evidence which Maryland conceded was "legally relevant." 108 S.Ct. at 1865, n.7. Here, the Arizona trial judge considered all potentially mitigating evidence proffered by the defendant. (Pet. Brief p. 14) However, only evidence of mitigating facts more likely true than not is sufficiently certain under Arizona's scheme to form the basis of a sentencer's rejection of the death penalty. Such state channeling of

sentencer discretion should be validated.

There is nothing about the nature of mitigating evidence or finding mitigating factors which precludes placing an affirmative burden as to their existence on a defendant. As stated in Proffitt v. Florida, 428 U.S. 242, 257 (1976);

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a fact finder in a law suit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the. . . mitigating circumstances.

428 U.S. at 257-258.

In states such as Pennsylvania where capital sentencing is placed in the hands of jurors, the guidance provided by a minimal burden of proof encourages uniformity in jury behavior.

This Court has often said that sentencing should be individualized. See, e.g. Sumner v. Shuman, 483 U.S. 66, 75 (1987). The "individual" referred to is the defendant, not the juror. "Punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, 2947 (1989). Uniformity in the standard of evaluation of proffered circumstances of mitigation assures that a criminal defendant will have the evidence he proffers in mitigation measured by the same standard no matter what the individual predilections of the sentencer may be.

The contrary view, urged by Walton, was adopted in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), cert. pending. There, the Court of Appeals struck down the Arizona death penalty

statute holding, inter alia, that the state could not place any kind of burden of persuasion on the defendant. Id. at 1043. The Court of Appeals effectively demands that there be no evidentiary standards to guide the sentencing authority in its consideration of mitigating circumstances. If this Court is prepared to accept Walton's argument that standardless consideration of all conceivable assertions proffered in mitigation is a constitutional requirement, then it will have travelled full circle since Furman v. Georgia, 408 U.S. 238 (1972), holding that the very aspect of capital punishment that once made it unconstitutional--totally unguided sentencer discretion--now is necessary to comply with the Eighth Amendment.

That this untrammelled discretion would occur only as to mitigating

evidence does not diminish the seriousness of this standardlessness. Society, as well as the defendant, has a stake in the outcome of the sentencing hearing. Gardner v. Florida, 430 U.S. 349, 358 (1977). While occasional grants of mercy are not unconstitutional, Gregg v. Georgia, 428 U.S. 153, 199 (1976), it is important that sentences of life, like sentences of death, appear based on reason, not merely sympathy or prejudice--factors which should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." California v. Brown, 479 U.S. 538, 542 (1987). The consequences of such standardlessness extend beyond the "cases in which they occur, for when some defendants are able to avoid execution based on irrelevant criteria, there is a far

graver risk in executing others." Skipper v. South Carolina, 476 U.S. at 1, 14 n.2 (1986) (Powell, J., concurring).

A plurality of this Court, recognizing the dangerousness of such unfocused consideration of mitigating evidence, recently stated:

> Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors....Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin v. Lynaugh, 487 U.S. 164, ___, 108 S.Ct. 2320, 2330 (1988).

It is superficially appealing to extend Lockett's and Eddings' requirement of consideration of relevant miti-

gating evidence into an analysis of burdens of proof; however, full consideration of evidence proffered to prove mitigation and the evidentiary burdens of proof necessary to prove the existence of mitigating factors are two entirely different issues. See Adamson v. Ricketts, 865 F.2d 1011, 1065 (9th Cir. 1988) (dissent).

The burden of proof issue is at the confluence of the two lines of authority which form the basis of Eighth Amendment jurisprudence. The Eighth Amendment requires "replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death," Woodson v. North Carolina, 428 U.S. 280, 303 (1976), and that "a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's

character or background, and the circumstances of the offense." California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor J., concurring). These requirements "are somewhat in 'tension' with each other." Franklin v. Lynaugh, 487 U.S. 164, ___, 108 S.Ct. 2320, 2331 (1988). The balance struck by the Arizona legislature and defined by the Arizona Supreme Court is a constitutional accommodation of the competing interests. Amici urge that the Court uphold the validity of the Arizona statute, as one permissible manner a state may provide for a death penalty.

CONCLUSION

Amici curiae request this Court to affirm the judgment of the Supreme Court of Arizona.

Respectfully submitted,

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